



(4310-02-P)

DEPARTMENT OF THE INTERIOR

Office of the Secretary

48 CFR Parts 1401, 1452, and 1480

RIN: 1090-AB03

Acquisition Regulations; Buy Indian Act; Procedures for Contracting

AGENCY: Assistant Secretary for Policy, Management and Budget, Interior.

ACTION: Proposed rule.

SUMMARY: The Department of the Interior proposes to issue regulations guiding implementation of the Buy Indian Act, which provides the Bureau of Indian Affairs with authority to set aside procurement contracts for Indian-owned and controlled businesses. This rule supplements the Federal Acquisition Regulation (FAR) and the Department of the Interior Acquisition Regulations (DIAR).

DATES: Comments must be received on or before [INSERT DATE 60 DAYS FOLLOWING PUBLICATION IN THE FEDERAL REGISTER]. Tribal consultation meetings to discuss this rule will take place on Tuesday, August 14, 2012, from 8 a.m. to noon; Wednesday, August 15, 2012, from 3 p.m. to 6 p.m.; Tuesday, August 21, 2012, from 8 a.m. to noon; and Thursday, August 23, 2012, from 8 a.m. to noon.

ADDRESSES: You may submit comments, identified by the Number by any of the following methods:

- Federal rulemaking portal: <http://www.regulations.gov>.
- Email: consultation@bia.gov

- Mail or hand-delivery: Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action – Indian Affairs, U.S. Department of the Interior, 1849 C Street, NW, MS-4141, Washington, DC 20240
- See the SUPPLEMENTARY INFORMATION section of this notice for the locations of the tribal consultation meetings.

FOR FURTHER INFORMATION CONTACT: Jonodev Chaudhuri, Office of the Assistant Secretary – Indian Affairs, (202) 208-7163; jonodev.chaudhuri@bia.gov; or David Brown, Office of Acquisitions – Indian Affairs, (703) 390-6605, David.Brown@bia.gov.

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I. Background

The Bureau of Indian Affairs has obtained services and supplies from Indian sources using the Buy Indian Program since 1965, based on policy memoranda and acquisition. This rule is proposed to describe uniform administrative procedures that the BIA will use in all of its locations to encourage procurement relationships with eligible Indian Economic Enterprises in the execution of the Buy Indian Act.

This proposal incorporates the Assistant Secretary -Indian Affairs decision to increase economic development and employment of Indian persons by reducing the percentage of Indian ownership of business enterprises from a mandatory 100 percent to minimum 51 percent.

In addition, the regulations respond to and incorporate the nuances of the Section 831 of the National Defense Authorization Act for Fiscal Year 1991 (10 U.S.C. 2301 note) that amended 25 U.S.C. 47 to allow Indian firms to participate in the Department of Defense's Mentor-Protégé Program and not lose their eligibility for contracts awarded under the authority of the Buy Indian Act. This proposed rule includes language stating that participation in the Mentor-Protégé program has no effect on eligibility for contracts awarded under the authority of the Buy Indian Act.

This proposed rule also includes revisions to address the input received as a result of earlier publications and three consultation hearings in Indian Country.

II. Tribal Consultations Planned

The Office of the Assistant Secretary – Indian Affairs will be hosting tribal consultation meetings addressing this rule at the following dates and locations:

Date	Time	Venue
August 14, 2012	8 a.m. – 12 p.m.	National Indian Programs Training Center 1011 Indian School Road, NW, Suite 254 Albuquerque, NM 87104 (505) 563-5400
August 15, 2012	3 p.m. – 6 p.m.	Holiday Inn Grand (In conjunction with NADC Conference 2012) 5500 Midland Road Billings, MT 59101 (406) 248-7701
August 21, 2012	8 a.m. – 12 p.m.	Hilton Sacramento Arden West 2200 Harvard Street Sacramento, CA 95815 (916) 924-4900
August 23, 2012	8 a.m. – 12 p.m.	Mystic Lake Casino Hotel 2400 Mystic Lake Boulevard Prior Lake, MN 55372 (952) 445-9000

Tribal leader letters announcing these consultation meetings were distributed on July 5, 2012, providing advance notice of these consultations.

III. Statutory Authority

The authority to issue regulations is vested in the Secretary of the Interior by 5 U.S.C. 301. The authorizing statute is section 23 of the Act of June 25, 1910 (25 U.S.C. 47, as amended).

IV. Overview of Proposed Rule

This rule supplements the Federal Acquisition Regulation (FAR) and the Department of the Interior Acquisition Regulations (DIAR). For this reason the rule is issued by the Assistant Secretary for Policy, Management and Budget. This rule formalizes an administrative procedure for all Bureau of Indian Affairs acquisition activities and locations to ensure uniformity for eligible Indian Economic Enterprises that submit offers under solicitations set aside under the Act and this part.

A. Numbering System

This rule follows the numbering system established by the FAR and supplements the DIAR. Section 1401.303(a)(3) of 48 CFR authorizes each Interior bureau to codify regulations implementing the DIAR.

Where material in the FAR and/or DIAR do not require BIA implementing regulations, there will be no corresponding section number in the supplementary material.

B. How This Rule Fits with the Indian Affairs Acquisition Regulations

When finalized, the rule will govern, and be incorporated into the Indian Affairs Acquisition Regulations (IAAR), which establishes uniform acquisition policies and procedures for BIA, and is part of the Indian Affairs Manual (IAM). Handbooks, Acquisition Guidance Releases and the BIA's Guidelines on the Charge Card Program supplement the IAAR provisions of the IAM.

C. What This Rule Does

The BIA has encouraged major initiatives for economic development and employment of Indian persons, such as reducing the required percentage of Indian ownership of Indian economic enterprises from 100 percent to 51 percent. In support of these initiatives, the previously proposed rules have been revised and are published here as a new proposed rule.

Section 831 of the National Defense Authorization Act for Fiscal Year 1991 (10 U.S.C. 2301 note) amended 25 U.S.C. 47 to allow Indian firms to participate in the Department of Defense's Mentor-Protégé Program and not lose their eligibility for contracts awarded under the authority of the Buy Indian Act. This rule includes language stating that participation in the Mentor-Protégé program has no effect on eligibility for contracts awarded under the authority of the Buy Indian Act.

This rule formalizes an administrative procedure for all Bureau acquisition activities/locations to ensure that the Bureau will apply the procedures uniformly for eligible Indian Economic Enterprises that submit offers under solicitations set aside under the Act and this part.

V. Development of Proposed Rule

A. Prior Publication and Comment Solicitation

This rule has been in development for decades. BIA published proposed rules in the Federal Register on October 8, 1982 (47 FR 44678), November 15, 1984 (49 FR 45187), June 30, 1988 (53 FR 24738), and September 12, 1991 (56 FR 46468). Public comments received by BIA were reviewed, addressed in succeeding editions, and incorporated in this proposed rule, where applicable.

Notification regarding a series of three public consultation sessions was published in the Federal Register on October 18, 2001 (66 FR 52931). The consultation sessions were conducted in Oklahoma City, Oklahoma, on October 25, 2001; in Scottsdale, Arizona, on November 8, 2001; and in Portland, Oregon, on November 15, 2001.

Most recently, BIA circulated a draft rule and held a series of three tribal consultation sessions in 2010. The consultation sessions were conducted in Portland, Oregon on April 26, 2010; in Rapid City, South Dakota, on April 28, 2010; and in Tulsa, Oklahoma on April 29, 2010. BIA published notice of these consultations in the Federal Register on March 26, 2010 (75 FR 14547). Comments received at all these consultation meetings were reviewed and incorporated in this proposed rule, where applicable.

B. Summary of Comments

In addition to changes addressing the following comments, we made several editorial changes to the text of the proposed rule to clarify our intent regarding specific provisions, including changes to subchapter A. A significant portion of BIA's acquisition regulation covered under subchapter A does not impact a contractor's ability to contract with the BIA and therefore does not require publication in 48 CFR part 14. These editorial changes are minor and do not affect the substance or intent of the rule.

The following is a summary of some of the main categories of comments and BIA's responses.

1. Goals for Set-Asides

Comment: One commenter recommended additional language identifying program goals for awarding contracts to Indian Economic Enterprises.

Response: This rule establishes that BIA will conduct a market survey to determine whether an Indian Economic Enterprise is appropriate for every contract it solicits.

2. Consistency with the Federal Acquisition Regulation (FAR)

Comment: One comment expressed concern about references to the Federal Acquisition Regulation (FAR) on the premise that the Buy Indian regulation may seem to be in conflict with the FAR.

Response: The Buy Indian Act regulation may be compared to the spoke of an umbrella with the FAR as the umbrella. The two regulations work in tandem. The regulatory authority that encompasses the Buy Indian set-aside authority may be found in FAR 6.302-5, which authorizes “other than full and open competition” when “authorized or required by law.” The law authorizing Buy Indian set-asides is 25 U.S.C. 47, as amended.

Comment: Several comments questioned whether there was an inconsistency in the proposed rule regarding small business set-asides for acquisitions valued between \$3,001 and \$150,000, specifically, the relationship of the Act with regard to eligible Indian enterprises and the order of preference in FAR 8.001.

Response: The Bureau must adhere to the Small Business Act Requirements, as it governs small purchases, and at the same time continue its policy of utilizing the Buy Indian Act. To this end, it has attempted to join the two requirements in the proposed section 1480.503(b). When the Bureau contracting officer cannot make an advance determination of a potential award as an Indian small business set-aside under the Buy Indian Act, the Bureau must follow the order of preference in the Federal Acquisition

Regulation (see FAR 8.001). If an award cannot be made to an eligible Indian firm that is responsible, responsive, and is price reasonable, then the Buy Indian Act set-aside notice is canceled. However, the Bureau may not move from a Buy Indian Act set-aside to full and open competition without first giving consideration to other authorized procurement set-aside programs.

Comment: One commenter requested clarification of the size standards and stated that the draft regulation would allow the Bureau to contract only with Indian economic enterprises that are also small businesses, thereby disqualifying large Indian economic enterprises.

Response: The rule mirrors the guidance of FAR Part 19, and specifically FAR section 19.502, which enumerates when contracts shall be set aside for small businesses and when deviations are permitted.

Comment: One commenter asked why the FAR is restated instead of citing applicable FAR parts and subparts. Another commenter stated that the rule contains too many references to the FAR and DIAR, which makes it difficult for a layperson to understand.

Response: The Bureau has reviewed the rule and removed any unnecessarily duplicative restatement of the FAR and FAR and DIAR citations.

3. Definitions

Comment: One comment expressed opposition to the proposed rule definition for "Indian" (1452.280-4 and 1480.201), and stated an opinion that the term in the rule should incorporate a quarter-degree blood requirement as a requirement for being an enrolled tribal member.

Response: The commenter appears to have mixed two distinct issues. Tribes may set a blood quantum for membership, and many have. In some instances tribes, and the Bureau, have used the degree of Indian or tribal blood as one factor in establishing the relative priorities among eligible participants. However, the Bureau cannot impose a blood quantum requirement for initial eligibility for its programs unless the legislation authorizing the program allows it. The Bureau programs are available to all tribal members regardless of blood degree. The Bureau defers to tribal governments in the setting of the tribe's own standards for enrollment and membership so long as the standards reflect a meaningful bilateral, political relationship between the tribe and its members.

Comment: Another comment stated that the rule simply states rather than employs or invokes 25 U.S.C. 479 and 479a regarding “who is an Indian” and therefore who is eligible.

Response: The rule relies upon 25 U.S.C. 479, which defines “Indian” as a member of a tribe.

Comment: Another comment expressed disagreement with the proposed rule definition of "Indian land" (1480.201), citing consideration for the term "Indian country," as found in 18 U.S.C. 1151.

Response: The purpose of defining the term "Indian land" is to assist in determining when the Indian preference clauses set forth in the DIAR must be inserted into a Buy Indian Act set-aside contract under section 1480.601(a) of the rule. In contrast, the term "Indian country" defines Federal criminal jurisdiction in Indian areas and contains references to "dependent Indian communities" and to "Indian allotments,"

which do not provide sufficient guidance in determining the applicability of Indian preference clauses. Moreover, several comments were directed to the language in proposed section 1480.401(b) with regard to construction. The Bureau has changed the language to comply with FAR 6.1 and 6.2, as applicable to set-aside awards.

Comment: One comment asked for a definition of “Indian reservation.”

Response: The rule now includes a definition of “Indian reservation” based on the DIAR section 1452.226-70.

4. Indian Economic Enterprise Definition & Representation

a. Fifty-one (51) Percent Indian Ownership

Comment: A number of comments objected to formalizing by regulation the existing Bureau policy of having a minimum 51 percent Indian ownership of the Indian economic enterprise for participation in the set-aside awards under the Buy Indian Act.

Response: Before January 1988, Bureau policy required participant firms to be 100 percent Indian-owned and controlled. The Bureau changed its policy in order to facilitate and expand economic development on Indian reservations by increasing the opportunities for Indian businesses to obtain operating capital, which was often difficult, if not impossible, to do under the "100 percent ownership" policy. The Bureau believes this "minimum 51 percent ownership" requirement is a much more realistic requirement that can, with sufficient regulatory safeguards, protect the integrity of the majority Indian owner of the Indian economic enterprise.

Corresponding with the change in Bureau policy from "100 percent ownership" to "a minimum of 51 percent ownership" of an Indian firm, the Bureau will not certify "Indian" ownership of a participating firm. Rather, an economic enterprise will now

represent themselves in writing as an Indian economic enterprise in response to a specific Bureau set-aside. The contracting officer or an interested party, as defined in section 1480.201, may raise a protest to the representation declaration of an offeror. The contracting officer will handle the protest under proposed Subpart 1480.9 of the rule. The Bureau believes this approach will be more effective than a Bureau certification system to ensure the eligibility requirements of the Buy Indian Act.

b. Requirement for Daily Business Management

Comment: Some comments expressed concern that the rule does not include sufficient controls to ensure that the Indian economic enterprise is actually owned and controlled by Indians. These comments specifically requested a better description of what constitutes participation in the daily business management of the enterprise.

Response: The proposed rule defines Indian economic enterprise to include additional qualifications beyond what were included in previous versions. In addition to requirements of 51% ownership and management by an Indian or tribe, the Indian or tribe must receive the majority of earnings from the contract. The revised definition also clarifies that the individual Indians or tribal representatives must control management and daily business operations, and to ensure actual control, requires such individuals to possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business. The intent of these changes is to ensure that the individual Indians or tribal representatives take part in the policy-making, budgeting, controlling, directing, coordinating, organizing, and planning functions for an enterprise.

Comment: All challenged offerors should be permitted to respond by any means of contemporary communication (e.g., email).

Response: FAR section 33.206 states that contractor claims must be submitted in writing. A written response provides a record for review.

c. Self-Certification Policy

Comment: One comment expressed concern about the self-certification policy and mentioned that the Environmental Protection Agency disallowed self-certification in their Office of Small and Disadvantaged Business Utilization.

Response: BIA's self-certification policy is a simple representation statement that an offeror submits to support its claim for eligibility to participate in contract awards under the authority of the Buy Indian Act. The information is required in order for the contractor to obtain a benefit in accordance with the Buy Indian Act. In addition to being supported by stiff penalties, the representation is supported by long established elements of enforcement including both contractors and contracting officers who have successfully implemented the policy since 1988.

Comment: One commenter asked whether the Bureau is going to check the validity of self-certifications.

Response: The Contracting Officer is required to check the CCR to identify whether an Indian economic enterprise that self-certified is, in fact, and Indian economic enterprise.

d. Protests of an Entity's Representation as an "Indian Economic Enterprise"

Comment: The language in proposed section 1480.902 deals with time frames regarding Bureau receipt of a protest from an interested party. Some comments stated

that the deadlines were too short to permit lodging a protest. One comment objected to the specific words governing the protest deadline regarding Buy Indian eligibility.

Response: The Bureau must utilize the time frames for small business set-aside awards protests, referenced in FAR 19.302. The time available to lodge a protest is proposed in the rule as "a protest must be received by the contracting officer not later than 10 days after the basis of protest is known or should have been known, whichever is earlier." The Bureau believes the proposed time period to be reasonable for an interested party to lodge a written protest to the contracting officer, thereby conforming to the general principles reflected in FAR Subpart 33.1. Also, this wording is based on FAR 33.103 and has withstood the test of time. Protests based on alleged apparent improprieties in a solicitation are required to be filed before bid opening or the closing date for receipt of proposals. Since this protest would constitute a possible first-step procedure under FAR 33.1, the Bureau is required to: (1) promptly notify all offerors (successful as well as unsuccessful) within the prescribed time-frame (for sealed bids and competitive negotiations) so that all possible protests may be timely lodged with the Bureau; and (2) seek resolution within the prescribed time-frame before the interested party pursues the protest with the General Accounting Office (GAO). In keeping with the procedures outlined in FAR 33.1 for filing protests, the rule language is considered appropriate.

Comment: One commenter questioned the provision that states that a contract will be considered valid if a protest is received only after the award has been made. This commenter recommended that, instead, the CO investigate the situation and make a determination within 3 days.

Response: The proposed rule's presumptive valid contract language is consistent with FAR 33.104(c)(1) and (5). In accordance with that section of the FAR, the CO need not suspend contract performance or terminate the awarded contract unless the CO believes that an award may be invalidated and a delay in receiving the supplies or service is not prejudicial to the Government's interest.

e. Requesting an Independent Review in an Agency Protest

Comment: One comment expressed concern about a protester to the agency being able to request an independent review.

Response: An independent review may be requested in accordance with FAR 33.103. Prior to submission of an agency protest, all parties must use their best efforts to resolve concerns raised by interested parties at the contracting officer level through open and frank discussions. Where appropriate, alternative dispute resolution methods may be used.

In the event of a protest to the agency, award in the face of protest requires approval by an official other than the contracting officer. In the event of a GAO protest, approval is required by the head of the contracting activity.

5. Restrictions on Construction

Comment: A commenter expressed concern on the general topic of roads construction in relationship to the Indian set-aside program under the Buy Indian Act.

Response: The language in proposed section 1480.401(b) implements the decision of the Supreme Court in Andrus v. Glover, 446 U.S. 608, (1980), which upheld an Oklahoma Court's decision that the Bureau could not use the Buy Indian Act to contract for construction. The BIA currently interprets this decision as preventing

application of the Buy Indian Act set-aside program to off-reservation construction activities.

Comment: Some sentiment was expressed about difficulties with categorizing certain projects as construction.

Response: The FAR provisions at 22.401 and 37.301 may be used by the contracting officer to determine the appropriate categorization and clause usage. It is solely at the discretion of the contracting office to determine whether a project is construction or service. In order to make this determination, the contracting officer must review the statement of work and make a rational decision based on the information at hand.

6. Deviations

a. Tribal Modification of Buy Indian Acquisition

Comment: Several comments were received regarding the language in proposed section 1480.504-1(b)(14) wherein the Bureau contracting officer would provide written notice to the Indian governing body when a proposed set-aside involves services to be performed in whole or in part on land of that governing body. The objection focused on the Bureau notifying the involved tribe at the same time that the synopsis notice is published in the Governmentwide Point of Entry (GPE) (FedBizOpps). If a tribal resolution was passed opposing the set-aside intention, this Bureau action could require much unnecessary effort and expense on the part of a non-tribal Indian business firm in preparing a bid or proposal. This time and expense could be eliminated if the Indian business firms knew of the tribe's possible resolution of non-support for the set-aside approach.

Response: The Bureau made the necessary change to reflect Public Law 93-638, as amended by Public Law 100-472, to advise a tribe of any work that will be performed within the boundaries of its tribal lands. If the tribe does not (1) give a negative response to the notice or (2) advise the Bureau of its intent to contract for the program within 15 calendar days from the date of publication in FedBizOpps of the solicitation, the Bureau will then proceed with the solicitation. This change addresses the concern expressed by commenters and honors the spirit of Public Law 93-638 as amended by Public Law 100-472.

b. Authority to Deviate

Comment: Several comments requested clarification regarding who may authorize deviations and under what circumstances.

Response: Today's proposed rule clarifies who may authorize deviations based on the contract value thresholds, which were based on the thresholds established in FAR 6.304. The appropriate official will support the deviation by written determinations and findings made part of the contract file. In previous drafts, approval by the Assistant Secretary and BIA Director were necessary for a deviation. This proposed rule instead includes the tiered system for authority to approve to avoid potential delays resulting from going through several layers of approval, while continuing to ensure that deviations are only authorized in limited circumstances.

Comment: One commenter stated that cancellation of an announced opportunity should not be the remedy when only "unreasonable" offers are received. This commenter suggested that BIA instead negotiate with the offers or amend the announcement.

Response: Although contracting officers are expected to search for an Indian firm when pursuing a contract under section 8(a) of the Small Business Act, a regulatory provision mandating this action would infringe upon the jurisdiction of the Small Business Administration.

Comment: One commenter asked how the Contracting Officer would address a situation where his or her market research identifies only one Indian economic enterprise for a contract.

Response: The Contracting Officer's market research determines whether BIA solicits with a set-aside for Indian economic enterprises based on whether the government will receive at least two responsible, responsive offers. If the solicitation includes a set-aside but fewer than two responsible, responsive offers from Indian economic enterprises are received, in accordance with FAR 19.502.2, the Contracting Officer will withdraw the set-aside, and resolicit the requirement on an unrestricted basis.

7. Subcontracting

a. Percentages of Subcontracting Allowed

Comment: Several comments stated concern about the general topic of the percentages of subcontracting expressed in the language in proposed section 1452.280-3 and in 1480.602. Some respondents believed the percentages stated were too high for Indian economic enterprises.

Response: The percentages listed in the 1991 proposed rule are required for inclusion by FAR 52.219-14 and apply to all procurement contracts. Section 7(b) of Public Law 93-638, as implemented by DIAR 1452.226-71, applies the Indian preference requirement for employment and subcontracting opportunities under contracts for the

benefit of Indians, or contracts made under statutes authorizing contracts with Indians.

This principle is reiterated in this rule in sections 1480.503(c), 1452.280-2(c)(2), (3), and (4), 1480.601, and 1480.701(c).

Comment: Several comments requested clarification of whether the subcontracting clause requiring Native American subcontractors is included in solicitations for all BIA subcontracts, or only those BIA contracts awarded using a Buy Indian set-aside.

Response: The proposed rule clarifies that the subcontracting clause is required only for subcontracts to BIA contracts awarded using a Buy Indian set-aside.

b. Subcontracting Limitations and the Definition for “Cost of the Contract”

Comment: Some comments requested a definition for “cost of the contract” as mentioned in 1452.280-2.

Response: The clause entitled “Subcontracting Limitations” is based on FAR 52.219-14. The term “cost of the contract” means cost to the Government that is the total amount of the contract. Offerors must submit a detailed subcontract plan with their offers as required by 1452.280-2.

c. Verifying Compliance with Subcontracting Limitations

Comment: One comment expressed some concern about verification of compliance after contract award.

Response: The contracting officer and contracting officer’s representative are specifically required by 1480.701 to monitor the contractor’s compliance with the subcontracting limitations clause, the Indian preference clauses, and the requirements for Indian ownership and daily business management.

8. Indian Preference Requirements

Comment: One comment sought a specific definition of the term “extent feasible” as it is used in the Indian Preference clause which is in the Department of the Interior Acquisition Regulation (DIAR) at 1452.226-70.

Response: The words “extent feasible” are qualified by the phrase “consistent with the efficient performance of this contract.” The clause requires the contractor to maintain records to demonstrate compliance and states that non-compliance is cause for termination. If the contract is over \$50,000, and performed on or near a reservation, the contractor is required to appoint a liaison officer who will administer the contractor’s Indian preference program, maintain detailed six part records and provide a written semiannual report to the contracting officer. The Indian preference clauses provide reasonable specificity and controls.

9. Buy Indian Implementation by Other Bureaus

Comment: Some comments expressed concern about the loss of contracting opportunities under the Buy Indian set-aside authority when BIA transfers funds to another organization for award of a contract supporting BIA’s mission.

Response: The BIA has no regulatory authority beyond itself to implement the Buy Indian Act set-aside authority. A change to transfer the authority along with funds to another agency when entering into an agreement for award of a contract supporting BIA’s mission would require a different statute. BIA does encourage the implementation of the Indian Preference requirement under Section 7(b) of Pub. L. 93-638.

Comment: Several commenters asked who the rule will apply to—and specifically whether the Indian Health Service (IHS) will be bound by this rule.

Response: The BIA is promulgating this rule; therefore, the rule will apply only to BIA.

10 Other

Comment: One commenter suggested that the organization of the clauses to be inserted into solicitations be rearranged so that the definitions appear at the end, rather than at the beginning, of the clauses.

Response: BIA has chosen to retain the current organization for consistency with FAR Part 1 and the standard practice of defining terms prior to their use in clauses.

Comment: One commenter suggested imposing an order of preference for awarding Buy Indian set-asides that would give first preference to individually owned Indian concerns, then to tribal concerns, then to tribal 8(a) concerns, and finally Indian concerns participating in the Mentor-Protégé program.

Response: BIA interprets the purpose of the Buy Indian Act as giving preference to all eligible Indian economic enterprises.

Comment: One commenter asked whether there is a database of debarred Indian economic enterprises.

Response: It is the Contracting Officer's duty to review the debarred listing before making an award. The list is available on the Internet at www.epls.gov.

Comment: One commenter asked what the ramifications are for false certification.

Response: The FAR and DIAR include procedures to address false certification. See FAR 9.406 (Debarment), FAR 9.407 (Suspension), DIAR 1409.406 (Debarment), and DIAR 1409.407 (Suspension).

Comment: One comment asked why a set-aside cannot be extended if the solicitation hasn't closed and there hasn't been an award made on the contract.

Response: The Contracting Officer's market research determines whether to establish a set-aside for Indian economic enterprises, based on whether the Government will receive at least two reasonable, responsive offers. In accordance with FAR 19.502-2, if the Contracting Officer receives no acceptable offers from responsible small business concerns, the set-aside will be withdrawn and the requirement, if still valid, will be resolicited on an unrestricted basis.

Comment: One comment asked if BIA could review the TERO list to identify Indian economic enterprises.

Response: In addition to checking the CCR, the Contracting Officers may contact local TERO offices as part of their market research to ensure that their research was comprehensive.

Comment: Several comments asked how Indian economic enterprises may identify opportunities for which there is a Buy Indian set-aside.

Response: Indian economic enterprises should monitor www.FedBizOpps.gov to identify opportunities for which there is a Buy Indian set-aside.

Comment: A few comments asked how the Buy Indian set-asides work with Public Law 93-638.

Response: The rule provides the Indian tribe with the opportunity to contract under Public Law 93-638 for a requirement taking place on its reservation before BIA issues a solicitation with a Buy Indian set-aside. A tribal contract under Public Law 93-638, is a non-procurement action, so the tribe would not have to compete for the contract

(with or without a Buy Indian set-aside). The rule now refers to Public Law 93-638 to clarify that a tribe can invoke its rights under that statute.

VI. Procedural Requirements

A. Regulatory Planning and Review (Executive Orders 12866 and 13563).

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This rule is also part of the Department's commitment under the Executive Order to reduce the number and burden of regulations.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The total annual value of Buy Indian contracts is less than \$45 million awarded to fewer than 200 contractors.

C. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act.

(a) This rule does not have an annual effect on the economy of \$100 million or more. The annual value of contracts is less than \$45 million.

(b) This rule will not cause any increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The rule will be applied on a national basis and has no effect on the dollar amount expended for acquisitions.

(c) This rule does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The annual value of the acquisitions made under this authority is less than \$45 million.

D. Unfunded Mandates Reform Act

This rule does not impose any unfunded mandate on State, local, or tribal governments or the private sector. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. The rule merely governs acquisitions from contractors.

E. Takings Implications (Executive Order 12630)

In accordance with Executive Order 12630, the rule does not have any takings implications. The rule governs acquisitions from contractors.

F. Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the rule does not have any Federalism implications to warrant the preparation of a Federalism Assessment. The rule governs acquisitions from contractors and does not interfere with the administration of programs by State Governments.

G. Civil Justice Reform (Executive Order 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

H. Consultation With Indian Tribes (Executive Order 13175)

The BIA has held public meetings with the tribes as stated in the BACKGROUND section of this preamble as well as the several previous publications of the proposed rule. This meets the intent of the Executive Order. The rule will more directly affect any contractors who may decide to use the Buy Indian Act for subcontracting and Indian economic enterprises.

I. Paperwork Reduction Act of 1995

This regulation requires offerors to state whether they meet the definition of an “Indian economic enterprise.” This statement is a simple representation that an offeror submits to support its claim for eligibility to participate in contract awards under the authority of the Buy Indian Act 25 U.S.C. 47, as amended. Because this statement is a simple certification or acknowledgment, it does not qualify as a collection of information under the Paperwork Reduction Act. See 5 CFR § 1320.3(h).

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required because there is nothing inherent in the rule that will significantly affect the quality of the human environment; the rule merely regulates the implementation of an acquisition authority.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A statement of energy effects is not required.

L. Clarity of this Regulation

We are required by Executive Orders 12866 (section 1 (b)(12)) and 12988 (section 3(b)(1)(B)) and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use common, everyday words and clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the "ADDRESSES" section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

M. Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 48 CFR chapter 14

Government procurement, Indian Economic Enterprises, Reporting and record keeping requirements.

Dated: July 20, 2012

Amy Holley
Chief of Staff
Policy, Management and Budget

For the reasons set out in the preamble, the Department of the Interior proposes to amend chapter 14 of title 48 of the Code of Federal Regulations as follows:

PART 1401—DEPARTMENT OF THE INTERIOR ACQUISITION REGULATION SYSTEM

1. The authority for part 1401 continues to read as follows:

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

2. Add section 1401.301-80 to read as follows:

1401.301-80 Policy.

BIA must use the negotiation authority of the Buy Indian Act, 25 U.S.C. 47 to give preference to Indians whenever using that authority is authorized and feasible. The Buy Indian Act requires that, so far as may be feasible, Indian labor must be employed,

and purchases of the products of Indian industry may be made in open market at the discretion of the Secretary of the Interior. This requirement applies notwithstanding any other law and applies to all products of in industry, including printing.

PART 1452 SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. The authority for part 1452 continues to read as follows:

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

4. In subpart 1452.2, add the following sections to read as follows:

Subpart 1452.2 Texts of Provisions and Clauses

* * * * *

- 1452.280-1 Notice of Indian small business economic enterprise set-aside.
- 1452.280-2 Notice of Indian economic enterprise set-aside.
- 1452.280-3 Subcontracting limitations.
- 1452.280-4 Indian economic enterprise representation.

Subpart 1452.2 Texts of Provisions and Clauses

* * * * *

1452.280-1 Notice of Indian small business economic enterprise set-aside.

As prescribed in 1480.503(b)(1), and in lieu of the requirements of FAR 19.508, insert the following provision in each written solicitation of offers to provide supplies or services when purchasing commercial items under FAR Part 12 or using simplified acquisition procedures under FAR Part 13. If the solicitation is oral, information substantially identical to that contained in the provision must be given to potential offerors.

NOTICE OF INDIAN SMALL BUSINESS ECONOMIC ENTERPRISE SET-ASIDE (Current Date)

Under the Buy Indian Act, 25 U.S.C. 47, offers submitted in response to this solicitation are solicited only from Indian economic enterprises (Subpart 1480.8)

that also must be small business concerns. The offeror must represent that they meet the definition of Indian economic enterprise at the time of submission of its offer to a specific solicitation as evidence that it is eligible to be considered for award. Any acquisition resulting from this solicitation will be from such a concern. Offers received from enterprises that are not Indian economic enterprises will not be considered and will be rejected.
(End of provision)

1452.280-2 Notice of Indian economic enterprise set-aside.

As prescribed in 1480.504-1(b) (2), insert the following clause in solicitations and contracts involving Indian economic enterprise set-asides:

NOTICE OF INDIAN ECONOMIC ENTERPRISE SET-ASIDE (Current Date)

(a) Definitions as used in this clause.

Indian means a person who is a member of an Indian Tribe or “Native” as defined in the Alaska Native Claims Settlement Act (PL 92-203; 85 Stat. 688; 43 USC 1601).

Indian Economic Enterprise means any business activity owned by an Indian or an Indian Tribe that is established for the purpose of profit, provided that: (i) such Indian or Indian Tribe ownership shall constitute not less than 51 percent of the enterprise; (ii) the Indian or Indian Tribe shall receive a majority of the earnings from the contract; and (iii) the management and daily business operations of an Indian economic enterprise must be controlled by one or more individuals who are members of an Indian Tribe. To ensure actual control over the enterprise, the individuals must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business. The enterprise must meet these requirements throughout the following time periods:
(1) At the time an offer is made in response to a written solicitation;
(2) At the time of contract award; and,
(3) During the full term of the contract.

Indian Tribe means an Indian Tribe, band, nation, or other recognized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, including any Alaska Native village, regional or village corporation established under the Alaska Native Claims Settlement Act (PL 92-203, 85 Stat. 688; 43 U.S.C. 1601).

Representation means the positive statement by an enterprise of its eligibility for preferential consideration and participation for acquisitions conducted under the Buy Indian Act, 25 U.S.C. 47, in accordance with the procedures in Subpart 1480.8.

(b) General.

(1) Under the Buy Indian Act, offers are solicited only from Indian economic enterprises.

- (2) BIA will reject all offers received from ineligible enterprises.
- (3) Any award resulting from this solicitation will be made to an Indian economic enterprise, as defined in paragraph (a).
- (c) Required Submissions. In response to this solicitation, an offeror must also provide the following:
 - (1) A description of the required percentage of the work/costs to be provided by the offeror over the contract term as required by section 1452.280-3, Subcontracting Limitations clause;
 - (2) A description of the source of human resources for the work to be performed by the offeror;
 - (3) A description of the method(s) of recruiting and training Indian employees, indicating the extent of soliciting employment of Indian persons, as required by DIAR 1452.226-70, Indian Preference, or DIAR 1452.226-71, Indian Preference Program, clause(s);
 - (4) A description of how subcontractors (if any) will be selected in compliance with the "Indian Preference" or "Indian Preference" clause(s);
 - (5) The names, addresses, and descriptions of work to be performed by Indian persons or economic enterprises being considered for subcontracts (if any) and the percentage of the total direct project work/costs they would be performing;
 - (6) Qualifications of the key personnel (if any) that will be assigned to the contract;
 - (7) A description of method(s) for compliance with any supplemental Tribal employment preference requirements, if contained in this solicitation; and
- (d) Required Assurance. The contractor must provide written assurance to the Bureau that it will comply, or has, complied fully with the requirements of this clause. It must do this before the Bureau awards the Buy Indian contract, as well as, upon successful and timely completion of the contract, but before the Bureau Contracting Officer (CO) accepts the work or product.
- (e) Non-responsiveness. Failure to provide the information required by paragraphs (c) and (d) of this clause may cause the Bureau to find an offer non-responsive and to reject it.
- (f) Eligibility.
 - (1) Participation in the Mentor-Protégé Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991 (25 U.S.C. 47 note) does not render an Indian economic enterprise ineligible for contracts awarded under the Buy Indian Act.
 - (2) If a contractor no longer meets the definition of an Indian economic enterprise after award, the contractor must notify the CO in writing. The notification must include full disclosure of circumstances causing the contractor to lose eligibility status and a description of any actions that the contractor will take to regain eligibility. Failure to give the CO immediate written notification means that: (1) The economic enterprise may be declared ineligible for future contract awards under this part; and (2) The Bureau may consider termination for default if it is in the best interest of the government.

(End of clause)

1452.280-3 Subcontracting limitations.

A contractor shall not subcontract to other than responsible Indian economic enterprises more than 50 percent of the work under a prime contract awarded under the Buy Indian Act. For this purpose, work to be performed does not include the provision of materials, supplies, or equipment.

As prescribed in 1480.602(b), insert the following clause in each written solicitation or contracts to provide supplies, services, or on-reservation construction:

SUBCONTRACTING LIMITATIONS (Current Date)

(a) Definitions as used in this clause.

(1) Concern means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States or its outlying areas and that makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, material and/or labor, etc. "Concern" includes but is not limited to an individual, partnership, corporation, joint venture, association, or cooperative. For the purpose of making affiliation findings (see 19.101) any business entity, whether organized for profit or not, and any foreign business entity, *i.e.*, any entity located outside the United States and its outlying areas.

(2) Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required for performance of the contract, contract modification, or subcontract.

(3) Subcontractor means a concern to which a contractor subcontracts any work under the contract. The term includes subcontractors at any tier who perform work on the contract.

(b) Required Percentages of work by the concern. The contractor must comply with FAR 52.219-14 Limitations on Subcontracting clause.

(c) Indian Preference. Regardless of the contract type for services, supplies, or on-reservation construction, the contractor agrees to give preference to Indian organizations and Indian owned economic enterprises in awarding subcontracts under this contract in accordance with DIAR 1452.226-71, Indian Preference.

(d) Cooperation. The contractor must:

(1) Carry out the requirements of this clause to the fullest extent; and

(2) Cooperate in any study or survey that the CO, the Bureau of Indian Affairs, or its agents may conduct to verify the contractor's compliance with this clause.

(e) Incorporation in Subcontracts. The contractor must incorporate the substance of this clause, including this paragraph (e), in all subcontracts for supplies, services, and construction awarded under this contract.

(End of clause)

1452.280-4 Indian Economic Enterprise Representation.

As prescribed in 1480.801(a), insert the following provision in each written solicitation for supplies, services, or on-reservation construction:

INDIAN ECONOMIC ENTERPRISE REPRESENTATION

(Current Date)

The offeror represents as part of its offer that it [] does [] does not meet the definition of Indian economic enterprise as defined in 1480.201.

[End of provision]

5. Add subchapter H, consisting of part 1480, to read as follows:

SUBCHAPTER H – BUREAU OF INDIAN AFFAIRS SUPPLEMENT

PART 1480 ACQUISITIONS UNDER THE BUY INDIAN ACT

Subpart 1480.1 General

1480.101	Scope of part.
1480.102	Buy Indian Act acquisition regulations.
1480.103	Information collection.

Subpart 1480.2 Definitions

1480.201	<u>Definitions as used in this part.</u>
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Subpart 1480.3 Applicability

1480.301	Scope of part.
1480.302	Restrictions on use of the Buy Indian Act.

Subpart 1480.4 Policy

1480.401	<u>1480.401 Requirement to give preference to Indian Economic Enterprises.</u>
1480.402	<u>Delegations and responsibility.</u>
1480.403	<u>Deviations.</u>

Subpart 1480.5 Procedures

1480.501	General.
1480.502	Order of precedence for use of Government supply sources.
1480.503	Commercial item or simplified acquisitions.
1480.504	Other than full and open competition.
1480.504-1	Set-asides for Indian Economic Enterprises.
1480.504-2	Other circumstances for use of other than full and open competition.
1480.505	Debarment and suspension.

Subpart 1480.6 Contract Requirements

1480.601	Subcontracting limitations.
1480.602	Performance and payment bonds.

Subpart 1480.7 Contract Administration

1480.701	Contract administration requirements.
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Subpart 1480.8 Representation by an Indian Economic Enterprise Offeror

1480.801	General.
1480.802	Representation provision.
1480.803	Declaration process.

Subpart 1480.9 Protests of Representation

1480.901	General.
1480.902	Receipt of protest.
1480.903	Award in the face of protest.
1480.904	Protest not timely.

AUTHORITY: 25 U.S.C. 47, as amended (36 Stat. 861), 41 U.S.C. 253(c)(5), and 5 U.S.C. 301.

PART 1480 ACQUISITIONS UNDER THE BUY INDIAN ACT

Subpart 1480.1 General

1480.101 Scope of part.

This part prescribes policies and procedures for the procurement of supplies and services from Indian economic enterprises under the Buy Indian Act, 25 U.S.C. 47, and this part.

1480.102 Buy Indian Act acquisition regulations.

(a) This part supplements Federal Acquisition Regulation (FAR) and Department of the Interior Regulation (DIAR) requirements to satisfy the needs of the Bureau of Indian Affairs in implementing the Buy Indian Act.

(b) Regulations issued under this part will be codified in Department of the Interior (DOI) regulations at 48 CFR Chapter 14, Appendix A, Part 1480.

(c) This part is under the direct oversight and control of the Chief Financial Officer, BIA, Department of the Interior (hereinafter, “CFO”). The CFO is responsible for issuing and implementing this part.

(d) Acquisitions conducted under this part are subject to all applicable requirements of the FAR and DIAR, as well as internal policies, procedures or instructions issued by the Bureau of Indian Affairs. The provisions of the FAR takes precedence in all instances where there may be a conflict or discrepancy.

Subpart 1480.2 Definitions.

1480.201 Definitions as used in this part.

The following words and terms are used as defined below unless a different definition is prescribed for a particular subpart or portion of a subpart.

Bureau means the Bureau of Indian Affairs

Bureau central office means the Headquarters component located in Reston, Virginia that serves as staff resource to the Assistant Secretary-Indian Affairs. For

purposes of this part, the term refers specifically to the Office of Management and Administration, Division of Acquisition and Property Management.

Buy Indian Act means section 23 of the Act of June 25, 1910 (25 U.S.C. 47 (hereinafter “the Act”).

Buy Indian contract means any contract involving activities covered by the Buy Indian Act that is negotiated under the provisions of 41 U.S.C. 252(c) and 25 U.S.C. 47 between an Indian economic enterprise and a Contracting Officer representing the Department of the Interior.

Chief of the Contracting Office (CCO), unless otherwise specified by bureau/office regulation, means the senior GS-1102 within a contracting office. If the CCO is also the CO for an action requiring approval by the CCO, then approval shall be at a level above the CCO in accordance with bureau procedures.

Concern means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in the United States or its outlying areas and that makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, material and/or labor, etc. “Concern” includes but is not limited to an individual, partnership, corporation, joint venture, association, or cooperative. For the purpose of making affiliation findings (see FAR 19.101), “concern” includes any business entity, whether organized for profit or not, and any foreign business entity, *i.e.*, any entity located outside the United States and its outlying areas.

Contracting Officer (CO) means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings on behalf of the U.S. government.

Day means, unless otherwise specified, a calendar day.

Deviation means an exception to the requirement for use of the Buy Indian Act in fulfilling an acquisition requirement of the Bureau.

Fair market price means a price based on reasonable costs under normal competitive conditions and not on lowest possible cost, as determined in accordance with FAR 19.202-6(a).

Governing body means the recognized entity empowered to exercise governmental authority over an Indian tribe.

Indian means a person who is a member of an Indian Tribe or “Native” as defined in the Alaska Native Claims Settlement Act (PL 92-203; 85 Stat 688; 43 USC 1601).

Indian Economic Enterprise (IEE) means

(1) Any business activity owned by an Indian or an Indian Tribe that is established for the purpose of profit provided that:

(i) Such Indian or Indian Tribe ownership shall constitute not less than 51 percent of the enterprise;

(ii) That the Indian or Indian Tribe shall receive a majority of the earnings from the contract; and

(iii) The management and daily business operations of an enterprise must be controlled by one or more individuals who are Indians.

(2) To ensure actual control over the enterprise, the individuals must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business. The enterprise must meet these requirements for these time periods:

- (i) At the time an offer is made in response to a written solicitation;
- (ii) At the time of contract award; and
- (iii) During the full term of the contract.

Indian land means land over which an Indian Tribe is recognized by the United States as having governmental jurisdiction and land owned by a Native corporation established under the Alaska Native Claims Settlement Act of 1971 (85 Stat. 688, 43 U.S.C. 1601), so long as the Native corporation qualifies as an IEE, as defined herein. In the State of Oklahoma, or where there has been a final judicial determination that a reservation has been disestablished or diminished, the term means that area of land constituting the former reservation of the Tribe as defined by the Secretary.

Indian small business economic enterprise (ISBEE) means an IEE that is also a small business concern established in accordance with the criteria and size standards of 13 CFR 121.

Indian Tribe means an Indian Tribe, band, nation, or other recognized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, including any Alaska Native village or regional or village corporation under the Alaska Native Claims Settlement Act (PL 92-203, 85 Stat. 688; 43 USC 1601).

Interested party means an IEE that is an actual or prospective offeror whose direct economic interest would be affected by the proposed or actual Bureau award of a particular contract set-aside pursuant the Act.

Mentor-Protégé Program

Product of Indian industry means anything produced by an IEE either through physical labor or by intellectual effort involving the use and application of their skills.

Protest of representation means an accurate, complete and timely written objection by an interested party to an offeror's representation declaration status for a submitted in response to a solicitation under the Act.

Representation means the positive statement by an enterprise of its eligibility for preferential consideration and participation for acquisitions conducted under the Buy Indian Act, 25 U.S.C. 47, in accordance with the procedures in Subpart 1480.8.

Reservation means Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. 1601.

Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required for performance of the contract, contract modification, or subcontract.

Subcontractor means a concern to which a contractor subcontracts any work under the contract. The term includes subcontractors at any tier who perform work on the contract.

Work means the level of work effort by the prime contractor based on total direct project costs.

Subpart 1480.3 Applicability.

1480.301 Scope of part.

Except as provided in 1480.401(b), this part applies to all acquisitions, including simplified acquisitions, made by the BIA and by any other bureau or office of the Department of the Interior delegated the authority to make acquisitions under the Buy Indian Act and 1480.401(d).

1480.302 Restrictions on use of the Buy Indian Act.

(a) The Bureau must not use the authority of the Buy Indian Act and the procedures contained in this part to award intergovernmental contracts to tribal organizations to plan, operate or administer authorized Bureau programs (or parts thereof) that are within the scope and intent of the Indian Self-Determination and Education Assistance Act. The Bureau must use the Buy Indian Act solely to award procurement contracts to IEEs.

(b) The Bureau must not use the authority of this Act for off-reservation construction contracts, as defined in FAR 36.102 (48 CFR 36.02).

Subpart 1480.4 Policy

1480.401 Requirement to give preference to Indian Economic Enterprises.

(a) The Bureau shall utilize the negotiation authority of the Buy Indian Act, 25 U.S.C. 47, to give preference to Indians whenever the use of that authority is authorized and practicable. The Buy Indian Act provides that, so far as may be practicable, Indian labor shall be employed, and purchases of the products (including, but not limited to

printing, notwithstanding any other law) of Indian industry may be made in open market at the discretion of the Secretary of the Interior. Thus, the Bureau may use the Buy Indian Act to give preference to IEEs through set-asides when acquiring supplies, services, and on-reservation construction to meet Bureau needs and requirements. The Bureau must contract for on-reservation construction in accordance with FAR Part 36 (48 CFR part 36).

(b) The Bureau or any other bureau or office of the Department of the Interior delegated the authority to make acquisitions under the Buy Indian Act may not use the Buy Indian Act to give preference to IEEs through set-asides when acquiring construction services for off-reservation construction activities.

(c) The provisions of this section shall not apply to the awarding of contracts under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b et seq.) by DOI.

1480.402 Delegations and responsibility.

(a) The Secretary has delegated authority under the Buy Indian Act to the Assistant Secretary - Indian Affairs. The Bureau exercises this authority in support of its mission and program activities and as a means of fostering Indian employment and economic development.

(b) The Secretary may delegate authority under the Buy Indian Act to a bureau or office within the Department of the Interior other than the Bureau of Indian Affairs only by a Secretarial Order issued in accordance with Part 012, Chapter 1 of the Departmental Manual (012 DM 1).

(c) The CFO as the head of the contracting activity, is responsible for ensuring that all Indian Affairs acquisitions under the Buy Indian Act comply with the requirements of this part.

1480.403 Deviations.

(a) The following officials may authorize a deviation for an Indian Affairs acquisition:

For a proposed contract action...	The following official may authorize a deviation...
Exceeding \$25,000 but not exceeding \$550,000	The CCO (or the Bureau Procurement Chief, absent a CCO)
Exceeding \$550,000 but not exceeding \$11.5 million	Bureau Competition Advocate
Exceeding \$11.5 million but not exceeding \$57 million	The head of the procuring activity, or a designee who is a civilian serving in a position in a grade above GS-15 under the General Schedule or in a comparable or higher position under another schedule
Exceeding \$57 million	Senior procurement executive.

(b) Deviations may be authorized prior to issuing the solicitation when the Bureau makes the following determinations and the appropriate official takes the following actions:

Acquisition Type	Basis for Deviation	Necessary Actions
In pursuit of a simplified or commercial item acquisition in accordance with FAR Parts 12 or 13 and DIAR 1413	The Bureau determines after a market survey that there is no reasonable expectation of obtaining offers that will be competitive in terms of market price, quality, and delivery from two or more responsible ISBEs (or at least from one such enterprise, if the purchase does not exceed the dollar threshold described in FAR 13.003),	The CO must: (1) Document the reasons for the deviation in the file; (2) Ascertain the availability of small business suppliers through market research; and (3) If appropriate, compete the purchase using an unrestricted small business set-aside as prescribed in FAR 19.502-2.

In pursuit of all other acquisitions	The Bureau determines there is no reasonable expectation that offers will be received from two or more responsible IEEs at a reasonable and fair market price	The official must: (1) Provide a written determination in the contract file stating there is no reasonable expectation of receiving offers from two or more responsible IEEs and that award cannot be made at a reasonable and fair market price; and (2) Proceed with the acquisition using the order of precedence established in FAR 8.001.
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(c) Deviations may be authorized after issuing solicitations when the Bureau makes the following determinations and the appropriate official takes the following actions:

Acquisition Type	Basis for Deviation	Necessary Actions
In pursuit of a simplified or commercial item acquisition in accordance with FAR Parts 12 or 13 and DIAR 1413	Only one offer is received from a responsible ISBEE and the price is unreasonable or no offers are received from a responsible ISBEE.	The CO must: (1) Document the reasons for the deviation in the file; (2) Ascertain the availability of small business suppliers through market research; and (3) If appropriate, compete the purchase using an unrestricted small business set-aside as prescribed in FAR 19.502-2.
In pursuit of all other acquisitions	The Indian tribe justifies a deviation under 1480.504-1(b)(3).	The Bureau must proceed under PL 93-638.
	(1) All otherwise acceptable offers received from IEEs are unreasonable; (2) Only one offer is received from an IEE and the CO determines the price to be unreasonable; or (3) No responsive offers have been received from IEEs.	The official must: (1) Cancel the solicitation; (2) Reject all offers in writing in accordance with FAR 14.404-3; and (3) Complete the acquisition by either: (i) Using negotiation, provided the CO has obtained the approval required by FAR 14.404-1; or (ii) If negotiation with the offerors

Acquisition Type	Basis for Deviation	Necessary Actions
		responding to the canceled solicitation is not authorized, the CO must proceed with a new acquisition using the order of precedence in FAR 8.001.

(d) In response to a set-aside acquisition, when using competitive proposals, proposals may be rejected by a written determination by the CCO that a reasonable price cannot be negotiated.

Subpart 1480.5 Procedures

1480.501 General.

All acquisitions made in accordance with this part, including simplified or commercial item acquisitions, must conform to all applicable requirements of the FAR and DIAR.

1480.502 Order of precedence for use of Government supply sources.

Acquisitions made under an authorized deviation from the Buy Indian Act regulation must be made in conformance with the order of precedence required by FAR 8.002 (48 CFR 8.002).

1480.503 Commercial item or simplified acquisitions.

(a) Each acquisition of supplies, services, and on-reservation construction that is subject to commercial item or simplified acquisition procedures in accordance with FAR Part 12 or 13 (48 CFR part 12 or 13) and DIAR 1413 must be set aside exclusively for ISBEEs. The Bureau will use ISBEE commercial item(s) or simplified acquisition set-asides to accomplish this preference action.

(b) Each written solicitation of offers under an ISBEE commercial item or simplified acquisition set-aside must contain the provision at section 1452.280-1, NOTICE OF INDIAN SMALL BUSINESS ECONOMIC ENTERPRISE SET-ASIDE. If the solicitation is oral, information substantially identical to that contained in the provision must be given to potential offerors.

(c) If the CO proceeds with an ISBEE commercial item or simplified acquisition set-aside and receives an offer at a reasonable price from only one such responsible economic enterprise (see FAR 19.502-2 (48 CFR 19.502-2)), the CO must make an award to that enterprise.

(d) Commercial item or simplified acquisitions under this section must conform to the competition and price reasonableness documentation requirements of FAR 12.209 (48 CFR 12.209) for commercial item acquisitions and FAR 13.106 (48 CFR 13.106) for simplified acquisitions.

(e) Clauses and Provisions.

(1) Insert the provision at 1452.280-4, INDIAN ECONOMIC ENTERPRISE REPRESENTATION, in each solicitation of offers or requests for quotations that is set aside for IEEs.

(2) Insert the clause at 1452.280-3, SUBCONTRACTING LIMITATIONS, in purchase orders and contracts for services, supplies, or on-reservation construction and awarded to IEEs.

(3) Insert the clause at DIAR 1452.226-71, Indian Preference Program, in accordance with DIAR 1426.7003(b).

1480.504 Other than full and open competition.

1480.504-1 Set-asides for Indian Economic Enterprises.

(a) Each proposed procurement for supplies or services that has an anticipated dollar value in excess of the simplified acquisition threshold amount in FAR Part 13.003 (48 CFR 13.003) must be set aside exclusively for IEEs, and referred to as an "Indian Economic Enterprise Set-aside," when there is a reasonable expectation that offers will be received from two or more responsible, IEEs and award will be made at a reasonable price except when:

(1) The acquisition is for off-reservation construction, as described in 1480.401(b);

(2) A deviation has been obtained in accordance with 1480.402; or

(3) Use of other than full and open competition has been justified and approved in accordance with 1480.504-2.

(b) When acquiring services to be performed in whole or in part on Indian land, the CO must give written notice to the governing body or bodies of the applicable Indian tribe simultaneously with publication of the synopsis required by paragraph (c)(1) of this section. The notice must state the Bureau's intent to solicit services or supplies using an IEE set-aside and provide the tribe with the opportunity to contract for the program within 15 calendar days from the date of the synopsis publication in the GPE.

(1) If the tribe does not oppose the set-aside intention or advise the Bureau by the established deadline of its intent to contract, the Bureau will proceed with the solicitation in accordance with FAR 5.2 (48 CFR 5.2).

(2) If the tribe advises the Bureau by the established deadline of its intent to contract, it must adequately justify a deviation for work on or near its own Indian land through a tribal resolution in accordance with Public Law 93-638.

(c) When using an IEE set-aside in accordance with this section, the CO must do the following:

(1) Synopsise the acquisition in the Governmentwide point of entry (GPE) as required by FAR Subpart 5.2 (48 CFR subpart 5.2), and identify it as an IEE set-aside.

(2) Use the Class Justification for Use of Other Than Full and Open Competition (JOFOC) in Acquisition of Supplies and Services from Indian Industry to meet the requirements of FAR 6.303 (48 CFR 6.303).

(3) By separate memorandum to the file, document that the supplies or services to be acquired are available from two or more responsible and IEEs; the anticipated cost to the Bureau of the required supplies or services is determined to be reasonable; and the information in the “Class Justification for Use of Other Than Full and Open Competition in Acquisition of Supplies and Services from Indian Industry” is accurate and complete as it pertains to the proposed acquisition.

(4) Reject offers that fail to provide representation that they meet the definition of an IEE. The CO may also request the Office of the Inspector General (on Form DI-1902 as part of a normal pre-award audit) to:

(i) Assist in determining the eligibility of the low responsive and responsible offerors on Buy Indian Act awards, and

(ii) Determine whether the work will be performed by the labor force required under 1480.602.

(5) When using sealed bidding, determine that the price offered by the prospective contractor is considered to be reasonable and at a fair market price as required by FAR 14.408-2 (48 CFR 14.408-2) before awarding a contract.

(6) When using competitive proposals, solicit proposals in accordance with FAR Subpart 15.2 (48 CFR subpart 15.2) and select sources in accordance with FAR Subpart 15.3 (48 CFR subpart 15.3) and DIAR Subpart 1415.6.

(7) When using competitive proposals or when negotiating modifications that impact the cost of a contract, conduct proposal analyses, including cost or price analyses in accordance with FAR Subpart 15.4 (48 CFR subpart 15.4), negotiate profit or fee in accordance with the procedures in FAR Subpart 15.4 and DIAR Subpart 1415.9, and prepare a negotiation memorandum in accordance with FAR 15.406-3 (48 CFR 15.406-3) and DIAR 1415.808.

(8) When acquiring architect-engineer services, solicit proposals and evaluate potential contractors in accordance with FAR Part 36 (48 CFR part 36) and DIAR Subpart 1436.6.

(d) This paragraph applies to solicitations that are not restricted to participation of IEEs.

(1) If an interested IEE is identified after a market survey has been performed and a solicitation has been issued, but before the date established for receipt of offers, the contracting office must provide a copy of the solicitation to this enterprise. In this case, the CO:

- (i) Will not give preference under the Buy Indian Act to the IEE, and
- (ii) May extend the date for receipt of offers when practical.

(2) If more than one IEE comes forward subsequent to the solicitation, but prior to the date established for receipt of offers, the CO may cancel the solicitation and re-compete it as an IEE set-aside.

(e) When only one offer is received from a responsible IEE at a reasonable and fair market price in response to an acquisition set-aside under paragraph (a) of this subsection, the CO must:

- (1) Make an award to that enterprise;
- (2) Document the reason only one offer was considered; and
- (3) Initiate action to increase competition in future solicitations.

(f) Provisions and Clauses.

(1) Insert the provision at 1452.280-4, INDIAN ECONOMIC ENTERPRISE REPRESENTATION, in accordance with 1480.801(a).

(2) Insert the clause at DIAR 1452.226-70, Indian Preference, in accordance with DIAR 1426.7003(a);

(3) Insert the clause at DIAR 1452.226-71, Indian Preference Program, in accordance with DIAR 1426.7003(b);

(4) Insert the clause at 1452.280-2, NOTICE OF INDIAN ECONOMIC ENTERPRISE SET-ASIDE, in accordance with 1480.504-1(b)(2).

(5) Insert the clause at 1452.280-3, SUBCONTRACTING LIMITATIONS, as prescribed in 1480.601(b);

(6) When applicable, Tribal employment preference requirements may be added to the requirements of the clause in accordance with DIAR 1426.7005.

1480.504-2 Other circumstances for use of other than full and open competition.

(a) Other circumstances may exist where the use of an IEE set-aside in accordance with 1480.401(a) and FAR 6.302-5 (48 CFR 6.302-5) is not feasible. In such situations, the requirements of FAR Subpart 6.3 (48 CFR subpart 6.3) and DIAR Subpart 1406.3 apply in justifying the use of the appropriate authority for other than full and open competition.

(b) Except as provided in FAR 5.202 (48 CFR 5.202), all proposed acquisition actions must first be publicized in accordance with the requirements of FAR 5.2 (48 CFR 5.2) and DIAR 1405.2.

(c) Justifications for use of other than full and open competition in accordance with this section must be approved in accordance with 14-6. These approvals are required for a proposed contract, or for an out of scope modification to an existing contract.

1480.505 Debarment and suspension.

Violation of the regulations in this part by an offeror or an awardee may be cause for debarment or suspension in accordance with FAR 9.406 and 9.407 (48 CFR 9.406 and 9.407). The Bureau must refer recommendations for debarment or suspension to the Director, Office of Acquisition and Property Management (PAM), Department of the Interior, in accordance with DIAR 1409.406 and 1409.407 through the Division of Acquisition and Property Management (central office) and concurred by the HCA.

Subpart 1480.6 Contract Requirements

1480.601 Subcontracting limitations.

(a) In contracts awarded under the Buy Indian Act and this part, the contractor must agree to perform the contract in accordance with FAR 52.219-14 (48 CFR 52.219-14), Limitations on Subcontracting.

(b) The CO must also insert the clause at 1452.280-3, SUBCONTRACTING LIMITATIONS, in all purchase orders and contracts for services, supplies, or on-reservation construction and awarded to IEEs pursuant this part.

1480.602 Performance and payment bonds.

Solicitations requiring performance and payment bonds must conform to FAR Part 28 (48 CFR part 28) and authorize use of any of the types of security acceptable in accordance with FAR Subpart 28.2 (48 CFR subpart 28.2) or section 11 of Public Law 98-449, the Indian Financing Act Amendment of 1984. The CO may accept alternative forms of security in lieu of performance and payment bonds according to FAR 28.102 (48 CFR 28.102) and 25 U.S.C. 47a, if a determination is made that such forms of security provide the Government with adequate security for performance and payment.

Subpart 1480.7 Contract Administration

1480.701 Contract administration requirements.

The CO and the CO's representative (see DIAR 1401.670) must monitor performance and progress to ensure contractor compliance with Part 42 of the FAR (48 CFR part 42) regarding all contract requirements. The CO must ensure contractor compliance with the following provisions of this part:

- (a) Qualification as an IEE as defined in 1480.201;
- (b) Maintenance of the subcontracting limitations required by the clause at 1452.280-3 when acquiring services, supplies, and on-reservation construction; and

(c) Enforcement of Indian preference requirements contained in DIAR 1426.7004, as prescribed by 1480.601.

Subpart 1480.8 Representations by an Indian Economic Enterprise Offeror

1480.801 General.

(a) The CO must insert the provision at 1452.280-4, INDIAN ECONOMIC ENTERPRISE REPRESENTATION, in all solicitations regardless of dollar value that are set aside for IEEs in accordance this part.

(b) To be considered for an award under 1480.503 or 1480.504-1, an offeror must:

(1) Represent that it meets the definition of "Indian economic enterprise" in response to a specific solicitation set-aside in accordance with the Act and this part.

(c) The enterprise must meet the definition of "Indian economic enterprise" :

(1) At the time an offer is made in response to a solicitation;

(2) At the time of contract award; and,

(3) During the full term of the contract.

(d) If, after award, a contractor no longer meets the eligibility requirements in paragraph (b) of this section, the contractor must provide immediate, written notification to the CO. The notification must include:

(1) Full disclosure of circumstances causing the contractor to lose eligibility status; and

(2) A description of actions, if any, that must be taken to regain eligibility.

(e) Failure to provide immediate written notification required by paragraph (d) of this section means that:

(1) The economic enterprise may be declared ineligible for future contract awards under this part; and

(2) The Bureau may consider termination for default if it is determined to be in the best interest of the government.

(f) The CO will accept an offeror's representation in a specific bid or proposal that it is an IEE unless another interested party challenges the IEE representation or the CO has reason to question the representation. Challenges of and questions concerning a specific representation declaration must be referred to the CO or CCO in accordance with subpart 1480.9.

(g) Participation in the Mentor-Protégé Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991 (25 U.S.C. 47 note) does not render an IEE ineligible for contracts awarded under the Buy Indian Act.

1480.802 Representation provision.

(a) Bureau contracting offices must provide copies of the IEE representation to any interested parties upon written request.

(b) The submission of a Solicitation Mailing List Application by an enterprise does not remove the requirement for it to provide representation as an IEE also required by this part if it wishes to be considered as an offeror for a specific solicitation. COs may determine the validity of the contents of the applicant's representation.

(c) Any false or misleading information submitted by an enterprise when submitting an offer in consideration for an award set aside under the Buy Indian Act is a violation of the law punishable under 18 U.S.C. 1001. False claims submitted as part of

contract performance are subject to the penalties enumerated in 31 U.S.C. 3729 to 3731 and 18 U.S.C. 287.

1480.803 Declaration process.

(a) Only IEEs may participate in acquisitions set aside in accordance with the Act and this part. Bureau procedure supports responsible IEEs and seeks to prevent circumvention or abuse of the Buy Indian Act.

(b) Eligibility is based on information furnished by the enterprise to a Bureau CO on the IEE representation provision at 1452.280-4 in response to a specific solicitation under the Buy Indian Act.

(c) The CO may ask the appropriate Regional Solicitor to review the enterprise's representation.

(d) The IEE representation does not relieve the CO of the obligation for determining contractor responsibility, as required by FAR Subpart 9.1.

Subpart 1480.9 Protests of Representation Declaration

1480.901 General.

(a) The CO can accept an offeror's written representation declaration of being an IEE (as defined in 1480.201) only when it is submitted with an offer in response to a solicitation under the Buy Indian Act. Another interested party may challenge the representation declaration status of an offeror or contractor by filing a written protest to the applicable CO in accordance with the procedures in 1480.902.

(b) After receipt of offers, the CO may question the eligibility declaration of any offeror in a specific offer by filing a formal objection with the CCO.

1480.902 Receipt of protest.

(a) An interested party must file any protests against the representation declaration of an offeror with the local CO.

(b) The protest must be in writing and must contain the basis for the protest with accurate, complete, specific and detailed evidence. The evidence must support the allegation that the offeror is either ineligible or fails to meet both the definitions of "Indian" and of "Indian economic enterprise" established in 1480.201. The CO will dismiss any protest that is deemed frivolous or that does not meet the conditions in this section.

(c) To be considered timely, a protest must be received by the CO not later than 10 days after the basis of protest is known or should have been known, whichever is earlier.

(1) A protest may be made orally if it is confirmed in writing within the 10-day period after the basis of protest is known or should have been known, whichever is earlier.

(2) A protest may be made in writing if it is delivered by hand, telefax, telegram, or letter postmarked within the 10-day period after the basis of protest is known or should have been known, whichever is earlier.

(3) A CO's objection is always considered timely, whether filed before or after award.

(d) Upon receiving a timely protest, the CO must:

(1) Notify the protestor of the date it was received, and that the representation declaration of the enterprise being challenged is under consideration by the Bureau; and

(2) Furnish to the economic enterprise (whose representation declaration is being challenged) a request to provide detailed information on its eligibility by certified mail, return receipt requested.

(e) Within 3 days after receiving a copy of the protest and the Bureau's request for detailed information, the challenged offeror must file with the CO a completed statement answering the allegations in the protest, and furnish evidence to support its position on representation. If the offeror does not submit the required material within the 3 days, or another period of time granted by the CO, the Bureau may assume that the offeror does not intend to challenge the protest and the Bureau must not award to the challenged offeror.

(f) Within 10 days after receiving a protest, the challenged offeror's response and other pertinent information, the CO must determine the representation declaration status of the challenged offeror and notify the protestor and the challenged offeror of the decision by certified mail, return receipt requested, and make known the option to appeal the determination to the PAM.

(g) If the declaration accompanying an offer is challenged and subsequently upheld by the PAM, the written notification of this Bureau action must state the reason(s). The PAM may review the economic enterprise for possible suspension or debarment recommendations.

1480.903 Award in the face of protest.

(a) Award of a contract in the face of protest may be made on the basis of the CO's written determination that the challenged offeror's representation declaration is valid.

(1) This determination is final for the Bureau unless it is appealed to the PAM, and the CO is notified of the appeal before award.

(2) If an award was made before the time the CO received notice of appeal, the contract must be presumed to be valid.

(b) After receiving a protest involving an offeror being considered for award, the CO must not award the contract until the CO has determined the validity of the representation, or 10 days have expired since the CO received the protest, whichever occurs first. Award must be made when the CO determines in writing that an award must be made to protect the public interest, or the supplies and services are urgently required, or a prompt award will otherwise be advantageous to the Government.

(c) If a timely protest on representation declaration is filed with the CO and received before award in response to a specific offer and solicitation, the CO must notify eligible offerors within one day that the award will be withheld and a time extension for acceptance is requested.

(d) If a protest on representation declaration is filed with the CO and received after award in response to a specific offer and solicitation, the CO need not suspend contract performance or terminate the awarded contract unless the CO believes that an award may be invalidated and a delay would prejudice the Government's interest. However, if contract performance is to be suspended, a mutual no cost agreement will be sought.

1480.904 Protest not timely.

If a CO receives an untimely filed protest of a representation declaration, the CO must notify the protestor that the protest cannot be considered on the instant acquisition

but will be considered in any future actions. However, the CO may question at any time, before or after award, the representation declaration status of an IEE.

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